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No. 82-1103

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION
and SIERRA PACIFIC POWER COMPANY,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF SIERRA PACIFIC POWER COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit properly determine that the Truckee River is not a "navigable water of the United States" where the evidence showed that it was not used or suitable for use for interstate transportation of persons or goods by water; that the physical characteristics of the state line portion of the river formed a barrier which required that logs, having been transported for short distances by water within Nevada, be removed and transported thereafter by railroad to their ultimate destination; and that certain Federal improvements to the river were made for flood control purposes and did not render the river suitable for commercial transport?

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BRIEF OF SIERRA PACIFIC POWER COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Sierra Pacific Power Company,[1] petitioner in the case before the Court of Appeals for the Ninth Circuit and respondent before the Federal Energy Regulatory Commission (FERC) submits this brief in opposition to the petition for writ of certiorari.

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[1] In accordance with Rule 28.1 of this Court, a complete listing of all parent companies, subsidiaries and affiliates of respondent Sierra Pacific Power Company follows: Sierra Pacific Power Company owns all of the common stock in Lands of Sierra, Inc., a real estate investment company, and Sierra Energy Company, an oil and gas exploration company.

OPINIONS BELOW

The Petitioner makes adequate reference to the reports of the opinion of the court of appeals, the initial order of the Federal Energy Regulatory Commission, and its order denying rehearing. The court opinion and the Commission's orders are contained as appendices in the Petition, and this Brief shall make references to those appendices where appropriate.

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are set forth in the Petition.

STATUTES INVOLVED

In addition to the provisions cited by Petitioner, Section 23(b) of the Federal Power Act, 16 U.S.C. § 817, and Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), are involved in this case.

Section 23(b) of the Federal Power Act provides in pertinent part:

> (b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, . . . except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act.

Section 313(b) of the Federal Power Act provides in pertinent part:

> The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

The full text of Sections 23(b) and 313(b) of the Federal Power Act are set forth in the Appendix hereto.

STATEMENT OF THE CASE

Petitioner seeks review of a decision by the Ninth Circuit Court of Appeals that the Truckee River is not a "navigable water of the United States" within the meaning of Section 23(b) of the Federal Power Act, 16 U.S.C. § 817, and therefore that Sierra Pacific Power Company (Sierra) was not required to obtain a license from the Federal Energy Regulatory Commission for the continued operation of four small, run-of-the-river hydroelectric generating plants which were constructed on the river between 1899 and 1911.[2]

The Truckee River is a turbulent mountain stream in a rocky, precipitous channel which flows northeasterly from Lake Tahoe, California for about 110 miles to its terminus at Pyramid Lake, Nevada. Sierra, an electric utility, operates these plants for the purpose of generating low-cost electric energy in the public interest (App. 30-36).

In July 1975, the Pyramid Lake Paiute Tribe of Indians (Tribe) filed a Complaint and Petition for Declaratory Order with the Federal Power Commission (now the Federal Energy Regulatory Commission) in which it alleged that Sierra's four hydroelectric plants were being operated in violation of Part I of the Federal Power Act, 16 U.S.C. § 791a, *et seq.*

Specifically, the Tribe alleged that the Truckee River is a "navigable water," as defined in Section 3(8) of the

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[2] Each plant individually diverts water from the Truckee River, up to necessary quantities, utilizes it immediately for power generation, and returns it to the river.

Federal Power Act, and therefore that Sierra was prohibited by Section 23(b) of the Federal Power Act from continued operation of its plants without the issuance of a license by the Commission pursuant to its authority under the Act. The Tribe alleged that licensing of these plants would permit modification of the rate of flow of water in the Truckee River in order to improve the quality of fishing in and around the Pyramid Lake Indian Reservation, which is located about 70 miles downstream from Sierra's plants.

Following an evidentiary hearing, the Administrative Law Judge, who had traversed the entire Truckee River, concluded that Sierra's hydroelectric plants were not subject to the Commission's licensing jurisdiction (*see*, App. 39). On appeal, the Commission found that the Truckee River is a "navigable water" as defined in Section 3(8) of the Federal Power Act, and accordingly reversed that conclusion (App. 31-32). In so doing, however, it recognized that Sierra's operation of the hydroelectric plants was not the cause of the deterioration in the Pyramid Lake fishery (App. 87-89).[3]

The Commission's finding of jurisdiction was reversed by the Ninth Circuit, which found that, while portions of the river were navigable, there was no substantial evi-

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[3] As shown in *U.S.* v. *Truckee Carson Irrigation District*, 649 F.2d 1286 (9th Cir. 1981), *amended*, 666 F.2d 351 (1982), *cert. granted*, 103 S.Ct. 205 (1982), the Pyramid Lake's fishery was productive through the first part of the twentieth century, but declined thereafter as a result of diversion of water from the Truckee River at Derby Dam for the Newlands Reclamation Project, and a buildup of refuse from upstream saw mills. The Derby Dam is not involved in this case. Because Sierra's plants are located several miles upstream from Derby Dam and have no associated water storage capacity, their operation has no effect on the Pyramid Lake fishery.

dence to support the Commission's finding that the Truckee River is a navigable water of the United States.

SUMMARY OF ARGUMENT

This case raises no question more significant than whether the Ninth Circuit properly exercised its authority under Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), to review the sufficiency of the evidence relied upon by the FERC for its decision that the Truckee River is a "navigable water of the United States."

The Ninth Circuit applied the correct standard of review to the FERC decision and gave appropriate deference to the FERC's determinations. On the merits, its decision is consistent with those of other courts of appeals that have considered similar questions. Moreover, it does not depart from the accepted and usual course of judicial proceedings, and does not decide any novel or important question of federal law.

When the FERC ruled that the Truckee River was a "navigable water of the United States," it did so despite the lack of evidence that the river had been used or was capable of being used for interstate transportation of goods or persons by water. It was therefore incumbent upon the Ninth Circuit to correct the Commission's error. That the Tribe, which had a full opportunity to create a full record on this subject, does not like the result hardly justifies grant of a writ of certiorari by this Court.

ARGUMENT

1. The Ninth Circuit's decision was based on a review of the sufficiency of the evidence.

Both the Commission and the Ninth Circuit relied in their determinations on the early decision of this Court in *The Steamer Daniel Ball* v. *U.S.*, 77 U.S. (10 Wall.) 557,

563 (1871) in which the Court defined "navigable waters of the United States" as waterways that form "a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water" (App. 2, 7-8, 41). The Ninth Circuit further cited *U.S.* v. *The Steamer Montello*, 78 U.S. (11 Wall.) 411 (1871), in which the Court ruled, conversely, that a navigable water is not a "navigable water of the United States" if it is only navigable between different places within the State (App. 8-9).

The Commission and the Ninth Circuit also relied on the criteria for "navigable waters of the United States" under the Federal Power Act enunciated in *U.S.* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940), which incorporated the principles established in *The Daniel Ball* and *The Montello* (App. 8, 42).

The Ninth Circuit's reversal of the Commission was based solely on the lack of substantial evidence to support the Commission's finding that the Truckee River met the applicable criteria, as set forth in these decisions (App. 2, 7).

Specifically, the Ninth Circuit found no substantial evidence to establish that the Truckee River was used, or suitable for use, for transportation of goods in interstate commerce (App. 9-11). In so doing, it noted that portions of the Truckee River had been used for *intrastate* transportation of logs for short distances within California and Nevada, but found that the evidence relied upon by the Commission to establish interstate use of the Truckee River for this purpose was "tenuous at best and does not support a finding that the state-line reach of the Truckee was used for transporting timber." (App. 10) Similarly, the Ninth Circuit found that evidence of the suitability of

the Truckee River for transportation of persons or goods in interstate commerce, either in its natural state or as a result of reasonable improvements, was insubstantial (App. 10-11).

The Ninth Circuit also concluded that the evidence did not support the Commission's alternative characterization of the state-line portion of the Truckee River as a non-navigable "interruption" which compelled land carriage, because there was no evidence "that persons or property ever traveled downstream across the state-line reach of the Truckee with the aid of a portage or 'land carriage.' " (App. 11-12)

Finally, the Ninth Circuit rejected the Commission's contention that the Truckee River constituted a "navigable water of the United States" on the basis that the state-line portion had been "authorized by Congress for improvement by the United States" because the evidence failed to establish that such improvements rendered the Truckee River navigable, or were intended for that purpose (App. 12-14).

The Administrative Law Judge properly recognized that, at best, the "discussion on navigability centers on seemingly picayune individual fact determinations from inexact newspaper articles which reduce the decision-making process to a virtual absurdity." Indeed, as will be further discussed below, the Commission itself recognized the deficiencies in the record evidence, but attempted to overcome such deficiencies either by speculating or making assumptions about matters for which there was no record support, or excusing the need for proper evidence.

The Ninth Circuit simply refused to permit the Commission to avoid its responsibility to render its decision on the basis of the evidence. Such determination hardly

warrants review by this Court. Inasmuch as the Ninth Circuit's decision turned on the sufficiency of the evidence in this case rather than on a broad legal doctrine, the petition for writ of certiorari should be denied.

2. The Ninth Circuit gave proper consideration to the Commission's interpretation of the Federal Power Act and its view of the evidence.

As noted above, the Ninth Circuit's decision rested on its application of the criteria for "navigable waters of the United States" set forth in *The Daniel Ball*, *The Montello*, and *Appalachian Electric Power Co.*, to the facts of this proceeding. Inasmuch as the Commission similarly relied on these precedents, the interpretation of the Federal Power Act was not at issue.

Nor were the basic facts relied upon by the Ninth Circuit different from those found by the Commission. For example, the Commission found that

> Although the record indicates that there was substantial logging traffic of a commercial nature in the upper 23 miles of the Truckee River, it contains relatively little evidence of such traffic in the next 14 miles downstream to Dog Creek at river mile 37 (of which the final 9 1/2 miles are currently utilized by three of Sierra's power developments). (App. 57)[4]

In addition, as discussed by the Ninth Circuit, the evidence cited by the Commission showed that the navigable character of the intervening state line portion of the Truckee River was different from the upstream portion, in which most of the logging had occurred:

> . . . the Commission acknowledges that a "possibly significant obstruction to navigation" exists in the

[4] Particular river locations are shown on a map appended to FERC Opinion No. 61 (App. 93).

> half mile before river mile twenty-seven: two long boulder-filled drops are found in this stretch and the gradient is 100 feet per mile. ER-59; *See also* ER-32. The first of Sierra's facilities, Farad power plant, is located just below river mile twenty-seven, and the Commission's opinion confirms that the gradient of the Truckee throughout the next fourteen miles where Sierra's plants are situated is greater than the incline upstream from Sierra's developments. ER-31-32. (App. 10-11)

Such evidence rendered futile the Commission's effort to establish navigability of this portion of the river by assuming that it was no different from the upstream portion, in which navigation had been shown to exist.

Similarly, the Commission conceded that there was no evidence to show that the journey of sawlogs by water from above River Mile 23 was simply interrupted, rather than terminated, at that point:

> . . . we have not found any evidence that sawlogs or wood products were removed from the Truckee River, portaged around the part in question [from River Mile 23 to River Mile 37], and placed back into the river for further transportation. (App. 67)

Finally, the Commission cited no evidence to show that any of the federally-funded improvements proposed for the Truckee were for navigational purposes (App. 74-80).

In claiming that the Ninth Circuit failed to accord proper deference to the Commission's opinion, the Tribe would reduce the role of the reviewing court to a nullity. However, the phrase "navigable waters of the United States" is a statutory term, the construction of which is not peculiarly within the FERC's expertise.

This Court has emphasized that a court may not "abdicate its ultimate responsibility to construe the language employed by Congress." *Zuber* v. *Allen*, 396 U.S. 168,

193 (1969). Rather, the agency's construction of its enabling legislation "is only one input in the interpretational equation of a reviewing court." *Id.* at 192. Thus, as the Court explained, in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965),

> while informed judicial determination is dependent upon enlightenment gained from administrative experience, in the last analysis the [statutory words, here, "navigable waters of the United States"] set forth a legal standard and they must get their final meaning from judicial construction.

Similarly, the court of appeals has authority, pursuant to Section 313(b) of the Federal Power Act, to judge the sufficiency of the evidence believed to support the FERC's findings of facts, and to affirm, modify, or set aside the Commission's orders, as appropriate. In this instance, the Ninth Circuit properly exercised its authority to construe the Federal Power Act and review the sufficiency of the evidence on which the Commission's decision was based. Its refusal to adopt and affirm the Commission's decision simply reflected that, notwithstanding the grant of all due deference, the Commission's opinion could not withstand the scrutiny of judicial review.

3. The Ninth Circuit's decision is consistent with recent decisions of other circuits involving whether a particular body of water should be deemed to be a "navigable water of the United States."

As noted above, the Ninth Circuit found that while certain portions of the Truckee River were navigable, the evidence failed to establish that the Truckee River was used or suitable for use for transportation of persons or property in interstate, as opposed to intrastate, commerce.

The Tribe asserts that the Ninth Circuit's decision in this case is inconsistent with decisions of other circuits, and another decision of the Ninth Circuit, which have found certain waters to be "navigable waters of the United States" even though they were located entirely within a single state. However, in each case cited, the evidence established that the body of water in question was or could have been used at some time for transportation of goods or persons by water in interstate commerce. No such evidence is present in the case before the Court.

In *Rochester Gas & Electric Corp.* v. *FPC*, 344 F.2d 594 (2nd Cir.), *cert. denied*, 382 U.S. 832 (1965), the evidence showed that the Genesee River flowed into acknowledged avenues of interstate and foreign commerce by water (the Erie Canal and Lake Ontario), and that actual use of the river from some indeterminate point upstream (south) of Rochester, N.Y. to Rochester, six miles from the mouth of the river, for intrastate shipments demonstrated its suitability for use as a connecting waterway for interstate or foreign shipments. However, notwithstanding the fact that the source of the Genesee River was in Pennsylvania, the court reversed the Commission's determination that it was a "navigable water of the United States" at Mt. Morris, N.Y., sixty-five miles from its mouth, because of lack of evidence of actual use of that portion of the river for commercial purposes and because available evidence on the physical characteristics of the river showed that improvement of the river for commercial purposes was infeasible.

In *Montana Power Co.* v. *FPC*, 185 F.2d 491 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951), the evidence showed that the Missouri River, also an interstate river, had been used for transportation of lumber and travelers above and below Great Falls, Montana, and that gold

miners traveled downstream from above the falls to below the falls with the aid of a portage around the falls. On the basis of this evidence, the court affirmed the Commission's conclusion that the portion of the Missouri River in question, which was entirely within Montana and almost entirely above Great Falls, was suitable for use for transportation of goods and persons in interstate commerce.

In all other cases on which the Tribe relies, including *Kaiser Aetna* v. *U.S.*, 444 U.S. 164 (1979); *The Daniel Ball, supra; The Montello*, 87 U.S. (20 Wall.) 430 (1874); and *Puget Sound Power & Light Co.* v. *FERC*, 644 F.2d 785 (9th Cir.), *cert. denied*, 454 U.S. 1053 (1981), the evidence, although principally focused on an intrastate portion of the waterway, affirmatively established that the waterway was suitable for use for interstate transportation of goods and persons by water.

As discussed above, the evidence in this proceeding shows that while portions of the Truckee River were used for *intrastate* shipment of goods, the river was neither used nor suitable for use as a vehicle for transportation of goods in interstate commerce.

Portions of the Truckee River lying upstream from Truckee, California (River Mile 14) and Boca, California, (River Mile 21), were used, with the aid of "splash dams" for carrying saw logs short distances to saw mills located along the river. The portion of the river between Verdi, Nevada (River Mile 37), and Glendale, Nevada (River Mile 52) was similarly used for transportation of logs. However, the Ninth Circuit found that there was no substantial evidence that the state line portion of the river, between Boca, California and Verdi, Nevada, was used or suitable for use for interstate commerce, or that goods which were transported by water in California were portaged around the state line portion of the river in

order to continue their journey by water down the Truckee.

The cases relied upon by the Ninth Circuit, including *National Wildlife Federation* v. *Alexander*, 613 F.2d 1054 (D.C. Cir. 1979); *Minnehaha Creek Watershed District* v. *Hoffman*, 597 F.2d 617 (8th Cir. 1979), and *Hardy Salt Co.* v. *Southern Pacific Transportation Co.*, 501 F.2d 1156 (10th Cir.), *cert. denied*, 419 U.S. 1033 (1974), each involved situations such as that illustrated by the evidence in this case, in which the waterway in question was unsuitable for interstate transportation of goods by water.

Thus, the Ninth Circuit's determination that the Truckee River is not a "navigable water of the United States" is not in conflict with decisions of other circuits construing that phrase. Rather, it simply reflects that the facts in this proceeding were different from those in the cases cited by the Tribe in an effort to establish such a conflict.

4. Because the decision below is based entirely on the facts peculiar to the Truckee River and the specific circumstances of this proceeding, it is unlikely that the Ninth Circuit's decision will affect FERC jurisdiction over other hydroelectric power plants.

Prior to 1935, a license was not *required* for the operation of a hydroelectric plant located on nonnavigable waters unless some other jurisdictional criteria existed. However, the owner of such a plant could, in his discretion, seek such a license.

In 1935, the Federal Power Act was amended to require that persons constructing hydroelectric plants on nonnavigable waters after that time also obtain a license if the interests of interstate or foreign commerce would

be affected. Act of Aug. 26, 1935, 49 Stat. 846, *codified at* 16 U.S.C. § 817; *see also FPC* v. *Union Electric Co.*, 381 U.S. 90 (1965); *Puget Sound Power & Light Co.* v. *FPC*, 557 F.2d 1311 (9th Cir. 1977); *Farmington River Power Co.* v. *FPC*, 455 F.2d 86 (2nd Cir. 1972).

Thus, the only hydroelectric plants which could be affected by the Ninth Circuit's decision are those, such as Sierra's, which were constructed on nonnavigable waters before 1935 for which the owner did not voluntarily seek a license.

Moreover, the Ninth Circuit's decision was based on the evidence of record in this proceeding, which showed that while portions of the Truckee River were "navigable," the river was not used or suitable for use for transportation of persons or property in *interstate* commerce.

Sierra is unaware of any other unlicensed hydroelectric power plants in which similar circumstances exist. Especially in light of the fact that hydroelectric power plants constructed after 1935 are subject to the Commission's licensing jurisdiction regardless of whether they are located on a navigable water of the United States, Sierra submits that the Ninth Circuit's decision will not have any significant effect on the Commission's licensing jurisdiction.[5]

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[5] Moreover, during the hearing, several alternative bases for Commission jurisdiction over Sierra's hydroelectric plants were also asserted. However, the Commission found it unnecessary to rule on these assertions because it believed it had jurisdiction over these plants from their location on what it took to be a navigable water of the United States (App. 40-41). Denial of the writ of certiorari will not prevent the Commission from considering these other possible bases of jurisdiction.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

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APPENDIX

The full text of Section 23(b) of the Federal Power Act, 16 U.S.C. § 817, follows:

> (b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, powerhouse, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, state, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

The full text of Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), follows:

> (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the addi-

tional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.